

This is a claim for repetitive injury to claimant's upper extremities ending on April 12, 2005, which was the last day claimant worked for respondent. In the July 14, 2008, Award, Judge Klein found claimant failed to prove he notified respondent of his accidental injury within the time limits of K.S.A. 44-520. Consequently, the Judge denied claimant's request

for permanent disability benefits. *Nonetheless, Judge Klein awarded claimant medical expenses; unauthorized medical expenses, if any; and future medical benefits.*

Claimant requests the Board to: (1) find that he provided respondent timely notice of his accidental injury; (2) find that he sustained personal injury by accident arising out of and in the course of his employment with respondent each and every working day through April 12, 2005; (3) find that he has sustained a 20 percent permanent partial impairment to each upper extremity; (4) grant payment of hospital and medical expenses; and (5) grant him temporary total disability benefits from April 12 to June 27, 2005, when he was off work for surgery.

Respondent contends: (1) claimant failed to prove he sustained personal injury by accident arising out of and in the course of employment; (2) claimant failed to give timely notice of his alleged accident; (3) Dr. Edward J. Prostic's functional impairment rating is inadmissible; and (4) Dr. Chris D. Fevurly's functional impairment rating is the only rating that is admissible and is the more credible opinion.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent through April 12, 2005?
2. Did claimant provide timely notice of his alleged accidental injury to respondent?
3. Is Dr. Prostic's opinion regarding claimant's functional impairment admissible?
4. What is the nature and extent of claimant's injury and disability?
5. Is claimant entitled to temporary total disability benefits from April 12 to June 27, 2005?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent manufactures plastic pipe fittings. Claimant worked for respondent for approximately one year. His first job was loading boxes onto pallets. But in October 2004, claimant moved into the fabrication department, where he operated routers and beveled the edges of the pipe fittings. Claimant would firmly grasp the individual pipe fittings, which would vibrate as claimant rotated the part around the table router blade. The larger parts,

which weighed from 20 to 40 pounds, required claimant to use a hand router and would take 15 to 20 minutes to process. Smaller parts required only five minutes. Nonetheless, claimant beveled parts continuously throughout his workday.

Claimant developed symptoms in his upper extremities while working in the router job. And in March 2005, claimant sought medical treatment from his personal physician, Dr. Gregory Mears, who diagnosed left elbow tendinitis. Claimant told the doctor he had been experiencing left elbow pain for approximately four weeks.<sup>1</sup> Dr. Mears referred claimant to a neurologist, Dr. Goldman, who performed an EMG. That test indicated claimant had carpal tunnel syndrome. Dr. Mears then referred claimant to Dr. Niazi for treatment.

On April 13, 2005, claimant saw Dr. Niazi, who told claimant to wear braces at work and also restricted his lifting to 20 pounds. Claimant took those restrictions to respondent and he was told there was no light duty work available. At that time, claimant signed a leave of absence form, which left blank the box designated "Job Related Injury/Illness."<sup>2</sup> Claimant testified he did not prepare the form and indicated he did not realize that box was not checked when he signed the document.<sup>3</sup>

On May 9, 2005, Dr. Niazi's office faxed an off-work slip to respondent. The slip indicated claimant was scheduled for surgery and should be excused from work "[t]o avoid aggravation of his/her condition" until further notice.<sup>4</sup>

In mid-May 2005, Dr. Niazi performed carpal tunnel release surgery on claimant's left arm. Following his release to return to work on June 27, 2005, claimant contacted respondent and was advised he had been replaced.

Before initiating this claim, claimant never requested respondent to provide him medical treatment nor did he request to complete an accident report. Claimant explained that he had never had a workers compensation claim before and that he really did not know what to do.<sup>5</sup>

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<sup>1</sup> R.H. Trans. at 17.

<sup>2</sup> Wood Depo., Ex. 2.

<sup>3</sup> P.H. Trans. (Nov. 30, 2005) at 32.

<sup>4</sup> R.H. Trans., Cl. Ex. 1.

<sup>5</sup> P.H. Trans. (Nov. 30, 2005) at 22.

**Did claimant timely notify respondent of a work-related injury?**

Claimant testified he told his lead man, Jerry W. Carpenter, that he was going to see Dr. Mears because the router was injuring his elbows and wrists.<sup>6</sup> But when claimant was asked what he specifically told his lead man, claimant testified:

That, I told him that my elbows was hurting and my wrist was, too, and I couldn't hold on to parts very good and I needed to go see a doctor about it.<sup>7</sup>

Respondent emphasizes that the above statement fails to relate claimant's symptoms to his work.

After seeing Dr. Mears, claimant also allegedly reported his symptoms or injury to his supervisor, Bryan D. Wood.<sup>8</sup> Moreover, when claimant took Dr. Niazi's restrictions back to work, he met with both Jeff Atkinson,<sup>9</sup> who is respondent's human resources manager, and Mary Cook, who handles respondent's insurance matters, and claimant allegedly told them he had hurt his arms and wrists working on the routing table. That testimony was presented, as follows:

Q. (Mr. Phalen) Who did you have a meeting with?

A. (Claimant) I had a meeting with Jeff Atkinson and the insurance woman, Mary, I don't know what her last name is.

Q. And in that meeting did they ask you how you hurt your hand and wrists?

A. No.

Q. They didn't, did you tell them how you hurt your hands and wrists?

A. I didn't, no, I didn't.

Q. You didn't tell them how you hurt your hands and wrists?

A. Well, I mentioned to them, it was back on the routing table.

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<sup>6</sup> *Id.* at 16.

<sup>7</sup> *Id.* at 25.

<sup>8</sup> *Id.* at 18.

<sup>9</sup> The name of respondent's human resources manager is reflected as both Jeff Atkinson and Jeff Atchison in the record.

Q. You described how you had problems?

A. I told them that I was hurting myself on routers, my arms and wrists.<sup>10</sup>

Following his first appointment with Dr. Mears, claimant continued to work. Claimant testified his left arm symptoms worsened and he began experiencing similar symptoms in his right arm. Claimant testified he advised Mr. Carpenter of that turn of events.<sup>11</sup>

Conversely, Mr. Carpenter, who no longer works for respondent, testified that claimant did not relate his symptoms to his work but, instead, said he had hurt his arm working on his car. Consequently, Mr. Carpenter did not prepare an accident report and did not send him to the company doctor. And Mr. Wood, who claimant also allegedly informed that his router job was hurting his hands, likewise denies that claimant related his upper extremity symptoms to his work. Mr. Wood testified claimant related his symptoms to an earlier injury.

Claimant denies talking with Jason Jenkins, respondent's assistant plant manager, about his symptoms. But Mr. Jenkins testified he spoke with claimant in April 2005 about his symptoms and claimant advised they were not work-related.

The Workers Compensation Act gives a worker 10 days to report an accident to the employer. The Act provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as

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<sup>10</sup> *Id.* at 20.

<sup>11</sup> R.H. Trans. at 21.

provided in this section, or (c) the employee was physically unable to give such notice.<sup>12</sup>

Although there are times the notice period may be extended to 75 days, claimant does not allege there was just cause to extend the period. Instead, claimant alleges he provided respondent notice on several different occasions in April 2005 before he was sent home on leave.

There is little, if any, evidence to corroborate claimant's testimony he notified respondent his symptoms in his upper extremities were related to his work. Conversely, Mr. Carpenter, Mr. Wood, and Mr. Jenkins directly contradict claimant's testimony in that regard. Moreover, claimant signed his leave of absence application leaving blank the box that would be checked for work-related injuries and illnesses. Finally, claimant initially testified he did not tell Mr. Atkinson and Ms. Cook how he had injured his hands, but he then changed that testimony. In short, claimant's testimony that he notified Mr. Atkinson and Ms. Cook that his upper extremity problems were related to his work is suspect.

The Board finds and concludes claimant has failed to prove he provided respondent with timely notice of his alleged accidental injury to his upper extremities. Consequently, claimant's request for workers compensation benefits is denied, which renders the issues enumerated above moot. The Board recognizes this is a harsh result that must be borne by claimant, but relief from the 10-day statute of limitations must come from the legislature.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>13</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board denies claimant's request for benefits.

Administrative costs are assessed against respondent and its insurance carrier.

**IT IS SO ORDERED.**

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<sup>12</sup> K.S.A. 44-520.

<sup>13</sup> K.S.A. 2007 Supp. 44-555c(k).

Dated this \_\_\_\_ day of November, 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Kurt W. Ratzlaff, Attorney for Respondent and its Insurance Carrier  
Thomas Klein, Administrative Law Judge